

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DAVID HERBERT,

Petitioner,

v.

CASE NO. 2:07-12580
HONORABLE VICTORIA A. ROBERTS

BILL DAVIS,

Respondent.

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**ORDER DENYING PETITIONER'S MOTION
FOR A CERTIFICATE OF APPEALABILITY**

This is a habeas corpus action under 28 U.S.C. § 2254. On July 31, 2007, the Court transferred Petitioner's habeas corpus petition to the United States Court of Appeals as a second or successive petition. Currently pending before the Court is Petitioner's motion for a certificate of appealability.

Ordinarily, a prisoner seeking post-conviction relief under 28 U.S.C. § 2254 must seek and obtain a certificate of appealability before appealing a district court's denial or dismissal of the petition. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). The Court, however, did not deny or dismiss Petitioner's habeas petition. Instead, the Court transferred Petitioner's pleading to the Court of Appeals for a determination of whether this Court is authorized to consider another habeas petition challenging the same conviction. *See Sims v. Terbush*, 111 F.3d 45, 47 (6th Cir. 1997) (stating that, when a petitioner files a second or successive petition for habeas corpus relief in the district court without § 2244(b)(3) authorization from the court of appeals, the district court must transfer the document to the court of appeals pursuant to 28 U.S.C. § 1631).

A certificate of appealability is unnecessary under the circumstances. Therefore, Petitioner's motion for a certificate of appealability [Dkt. 7, Sept. 28, 2007] is DENIED as moot.

S/Victoria A. Roberts

Victoria A. Roberts

United States District Judge

Dated: October 3, 2007

The undersigned certifies that a copy of this document was served on the attorneys of record and pro se petitioner by electronic means or U.S. Mail on October 3, 2007.

s/Carol A. Pinegar

Deputy Clerk